

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original w/ affidavit of
Marley

74-2636

To be argued by
PAMELA C. MCGUIRE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2636

JAMES G. KING,
Plaintiff-Appellant,
—against—

UNITED STATES CIVIL SERVICE COMMISSION,
ROBERT E. HAMPTON, JAYNE B. SPAIN, L. J.
ANDOLSEK, MAURICE L. ETZELL and KIM-
BELL JOHNSON,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
PAMELA C. MCGUIRE,
Assistant United States Attorneys,
Of Counsel.



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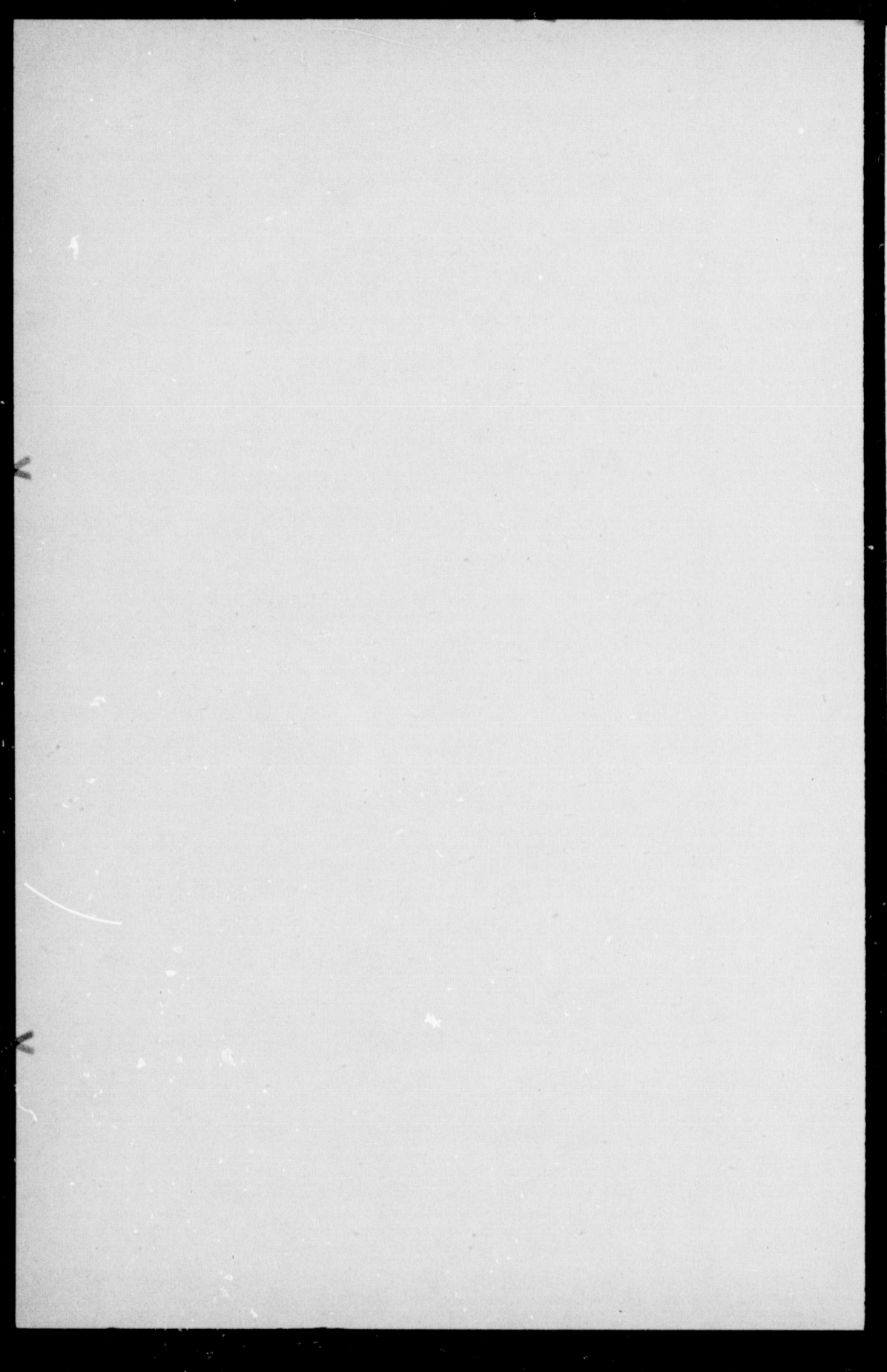


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
Summary of Argument	4
ARGUMENT:	
POINT I—The District Court properly held appellant's claims based upon his discharge to be barred by 28 U.S.C. § 2401 (a)	5
POINT II—The Tucker Act does not confer on the District Court subject matter jurisdiction over ap- pellant's challenge to his ineligible rating	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

<i>Brown v. United States</i> , 418 F.2d 442 (5th Cir. 1969) ..	6, 8
<i>Crown Coat Front Co., Inc. v. United States</i> , 363 F.2d 407 (2d Cir. 1966), <i>rev'd on other grounds</i> , 386 U.S. 503 (1967)	5
<i>Gnotta v. United States</i> , 415 F.2d 1271 (6th Cir. 1969), <i>cert. denied</i> , 397 U.S. 934 (1970)	7
<i>James v. Ambrose</i> , 367 F. Supp. 1321 (D.V.I. 1973)	5, 6
<i>Love v. United States</i> , 108 F.2d 43 (8th Cir. 1939), <i>cert. denied</i> , 309 U.S. 673 (1940)	8

<i>Mathis v. Laird</i> , 324 F. Supp. 885 (M.D. Fla. 1971), aff'd, 457 F.2d 926 (5th Cir.), cert. denied, 409 U.S. 871 (1972)	6
<i>R.E.D.M. Corp. v. LoSecco</i> , 291 F. Supp. 53 (S.D.N.Y. 1968), aff'd, 412 F.2d 303 (2d Cir. 1969)	8
<i>Richardson v. Hampton</i> , 345 F. Supp. 600 (D.D.C. 1972)	6, 8
<i>United States ex rel. Arant v. Lane</i> , 249 U.S. 367 (1919)	6, 8
<i>United States v. One 1961 Red Chevrolet Impala Sedan</i> , 457 F.2d 1353 (5th Cir.), cert. denied, 409 U.S. 982 (1972)	5
 <i>Statutes:</i>	
Tucker Act, 28 U.S.C. § 1346(a) (2)	6, 7, 8
28 U.S.C. § 2401(a)	5, 6

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Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

James G. King, Jr. appeals from an order of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered on November 1, 1974 dismissing appellant's third amended complaint for lack of subject matter jurisdiction.

The issues presented by this appeal are (1) whether 28 U.S.C. § 2401(a) bars claims arising out of the termination of appellant's employment which occurred six years and four months prior to the commencement of the action (the District Court held that any such claims are barred); and (2) whether the Tucker Act, 28 U.S.C. § 1346(a)(2), confers on the District Court original jurisdiction to review

administrative actions by the Civil Service Commission relating to appellant's eligibility for future government employment (the District Court held that the Tucker Act does not confer jurisdiction over such claims).

Statement of Facts

On September 20, 1964, appellant was appointed to the position of organic chemist in the Patent Office of the Department of Commerce (App. A 1).¹ This appointment was subject to the satisfactory completion of a one-year probationary period.

On August 24, 1965, appellant was notified that his employment in the Patent Office would be terminated on September 3 for "[f]ailure to qualify during probationary period due to lack of aptitude for interpreting and understanding patent disclosures." (App. A 2, A 3).

Appellant appealed his termination to the Appeals Examining Office of the Civil Service Commission, claiming that his discharge was the result of discrimination based upon marital status and physical handicap (App. A 4). On November 26, 1965, James I. Masterson, Chief of the Appeals Examining Office, informed appellant that his appeal was rejected "as it is not within the purview of section 315.806 of the Civil Service Regulations." (App. A 5-A 6). Appellant then appealed to the Board of Appeals and Review of the Civil Service Commission (App. A 7) and, on March 16, 1966, the Board of Appeals and Review affirmed the decision of the Appeals Examining Office (App. A 8-A 9).

¹ Page references in parenthesis refer to page numbers in the Appellees' Appendix which appear at the top middle of the page. Page numbers in the lower right corner reflect the pagination of the appeal file of the Civil Service Commission and should be ignored.

Subsequently, appellant filed applications with the United States Civil Service Examiners for the positions of Patent Examiner, Research Chemist, and Chemist. On May 23, 1966, the Division of Adjudication of the Civil Service Commission informed appellant, on the basis of his previous termination from government employment,² that he was ineligible for those positions (App. A 10-A 11). Appellant appealed the ineligible rating to the Bureau of Personnel Investigations of the Civil Service Commission and, on July 12, 1966, the Director of the Bureau of Personnel Investigations rescinded appellant's ineligible rating and referred his applications to the appropriate departments (App. A 12).

Appellant, appearing pro se, commenced this action in the District Court on July 7, 1972 (App. A 13). Upon motion of the defendant Civil Service Commission, appellant's initial complaint was dismissed by the District Court on January 5, 1973 with leave to recommence an action against the individual members of the Civil Service Commission for less than \$10,000. In an attempt to comply with the suggestions set forth in the court's January 5th decision, appellant the same day filed amended complaints against Kimball Johnson and Maurice L. Etzell of the Civil Service Commission (App. A 14-A 17).

Appellant subsequently retained counsel, John L. Edmonds, Esq., who, on October 15, 1973, filed a second amended complaint (App. A 18-A 19). On November 9, 1973, appellant's action was again dismissed for failure of appellant or appellant's counsel to appear for a pretrial status report. Upon application of appellant's counsel, however, the case was reopened and, on March 25, 1974,

² Following the termination of his employment with the Patent Office, appellant obtained an agency transfer to the Department of the Treasury, Bureau of the Mint. On January 8, 1966, he was discharged from that position "for failure to meet the minimum quantity standards of a chemist in a laboratory." (App. A 10).

appellant's counsel served and filed a third amended complaint, which is the subject of this appeal (App. A 20-A 22).

Appellees on October 18, 1974 served and filed a motion to dismiss the third amended complaint on the grounds that the action was barred by 28 U.S.C. § 2401(a) and by the doctrine of laches. Following oral argument on November 1, 1974, appellees' motion was granted and the complaint was dismissed.

Summary of Argument

Appellant in his third amended complaint alleges that jurisdiction is conferred on the District Court by the Tucker Act, 28 U.S.C. § 1346(a) (2), and seeks reinstatement to his position in the Patent Office and back pay. Appellant's claim for relief appears to be based upon two contentions: (1) that his employment with the Patent Office was wrongfully terminated; and (2) that the Civil Service Commission erred in awarding him an ineligible rating following his discharge and in failing to direct his reinstatement after the ineligible rating was rescinded.

Appellees contend that the District Court, in dismissing appellant's complaint, properly ruled (1) that any claims based upon appellant's discharge are barred by 28 U.S.C. § 2401(a); and (2) that the Tucker Act, 28 U.S.C. § 1346 (a) (2), does not confer subject matter jurisdiction over claims relating to appellant's ineligible rating.

ARGUMENT

POINT I

The District Court properly held appellant's claims based upon his discharge to be barred by 28 U.S.C. § 2401(a).

Section 2401(a) of Title ²18 provides in relevant part as follows:

Every civil action commenced against the United States shall be barred, unless the complaint is filed within six years after the right of action accrues.

The time limitation contained in this section is not merely an affirmative defense which can be raised by the Government or waived; it is a restriction on the subject matter jurisdiction conferred on the district court by the Tucker Act. In *Crown Coat Front Co., Inc. v. United States*, 363 F.2d 407, 411 (2d Cir. 1966), *rev'd on other grounds*, 386 U.S. 503 (1967), this Court held that

A Tucker Act claim is extinguished when the limiting time expires. The claim being extinguished, the court's jurisdiction is gone, and jurisdiction to adjudicate the claim cannot be conferred upon the court by any agreement.

Accord, United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir.), *cert. denied*, 409 U.S. 982 (1972).

Appellant's alleged right of action accrued when the termination of his employment became effective. See *James v. Ambrose*, 367 F. Supp. 1321, 1327 (D.V.I. 1973). The complaint fails to allege the date on which appellant's em-

A R G U M E N T

P O I N T I

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Appellant's alleged right of action accrued when the termination of his employment became effective. See *James v. Ambrose*, 367 F. Supp. 1321, 1327 (D.V.I. 1973). The complaint fails to allege the date on which appellant's em-

ployment was terminated; however, an examination of the appeal file of the Civil Service Commission submitted to the District Court by appellees reveals that on March 18, 1966, the Civil Service Commission Board of Appeals and Review affirmed the decision of the Appeals Examining Office denying appellant's appeal from his discharge (App. D. 2.). All administrative remedies were then exhausted, and appellant's termination became final. Appellant did not commence this action until July 7, 1972, six years and four months after his discharge became final. Accordingly, any claim arising out of the termination of appellant's employment is barred by § 2401(a).³ See *James v. Ambrose*, 367 F. Supp. 1321 (D.V.I. 1973); *Mathis v. Laird*, 324 F. Supp. 885 (M.D. Fla. 1971), *aff'd*, 457 F.2d 926 (5th Cir.), *cert. denied*, 409 U.S. 871 (1972).

POINT II

The Tucker Act does not confer on the District Court subject matter jurisdiction over appellant's challenge to his ineligible rating.

Appellant, in addition to challenging his discharge, apparently seeks to contest the determination made by the Division of Adjudication of the Civil Service Commission in May 1966 that he was ineligible for certain government positions, despite the fact that the ineligibility rating was rescinded by the Bureau of Personnel Investigations on July 12, 1966. Appellant further contends that the Bureau of Personnel Investigations erred in failing to direct his reinstatement to the Patent Office following the reversal of his ineligible rating.

³ Although the District Court did not find it necessary to reach the issue of laches, it should be noted that the doctrine of laches would also bar appellant's action. See, e.g., *United States ex rel. Arant v. Lane*, 249 U.S. 367 (1919); *Brown v. United States* 418 F.2d 442 (5th Cir. 1969); *Richardson v. Hampton*, 345 F. Supp. 600 (D.D.C. 1972).

The Tucker Act, the only basis of jurisdiction alleged by the appellant, provides that the districts courts shall have original jurisdiction over "[a]ny civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract. . . ."

Appellant's complaint alleges no constitutional, statutory, or regulatory provision upon which a claim challenging his ineligible rating could be based. In *Gnotta v. United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970), the plaintiff, claiming that he had been denied a promotion due to discrimination against him because of his national origin, brought a pro se action under the Administrative Procedure Act and the Tucker Act. In affirming the district court's dismissal of the action for lack of jurisdiction, the court of appeals adopted the findings of the district court and held, in part, that (415 F.2d at 1277-1278) :

The plaintiff does not allege that his alleged cause of action was created or authorized by any particular provision or section of the Constitution, Act of Congress, [or] regulation of any executive department. Nor does he allege what sort of an express or implied contract he attempts to base his claim. None of the executive orders or regulations which the complaint cites purports to confer any right on an employee of the United States to institute a civil action for damages against the United States. . . .

The [1964] amendment of [28 U.S.C. § 1346] merely extended to the district courts jurisdiction over cases which formerly could be tried only in the Court of Claims. * * * That statute does not authorize and is not broad enough to confer jurisdiction to hear and determine a claim for damages arising out of alleged discriminatory practices which may have resulted in

an employee of the Corps of Engineers being "passed over" for promotion. See *Love v. United States*, (8th Cir. 1943) [sic], 108 F.2d 43 [cert. denied, 309 U.S. 673, 60 S. Ct. 716, 84 L. Ed. 1018] * * *

Similarly, in the instant case, the Tucker Act does not confer on the District Court jurisdiction over a claim for damages based upon a determination by the Division of Adjudication that appellant was ineligible for certain government employment or upon the failure of the Bureau of Personnel Investigation to direct appellant's reinstatement following reversal of the ineligible rating.⁴

Finally, the District Court noted that appellant's claim challenging his ineligible rating would "in all probability" be barred by the doctrine of laches. In view of ^{his} holding on the jurisdictional issue, however, Judge Bartels did not find it necessary to rule on the laches question. Should this Court find that jurisdiction exists over appellant's claim for reinstatement or money damages, it is submitted that any such claim must nonetheless be barred by the appellant's laches. See, e.g., *United States ex rel. Arant v. Lane*, 249 U.S. 367 (1919); *Brown v. United States*, 418 F.2d 442 (5th Cir. 1969) (and cases cited therein); *Richardson v. Hampton*, 345 F. Supp. 600 (D.D.C. 1972).

⁴ It is well established that a claim for equitable relief such as reinstatement may only be maintained under the Tucker Act where such relief is incidental to a claim for money damages. See, e.g., *R.E.D.M. Corp. v. LoSecco*, 291 F. Supp. 53, 58 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 303 (2d Cir. 1969). Since appellant has failed to assert a claim for money damages which is cognizable under the Tucker Act, his claim for reinstatement must also fail.

CONCLUSION

The order of the District Court should be affirmed.

March 26, 1975

Respectfully submitted,

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Eastern District of New York.

PAUL B. BERGMAN,
PAMELA C. MCGUIRE,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK

COUNTY OF KINGS

EASTERN DISTRICT OF NEW YORK

} ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

two copies

That on the 26th day of March 1975 he served ~~two~~ copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Mr. James G. King, Jr.

119-73 Merrill Street

Jamaica, N. Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

26th day of March 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1976